IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 791

RONALD L. CRANE, *Petitioner*,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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Petitioner, Ronald L. Crane, prays that a writ of certiorari issue to review the decision and judgment of the Supreme Court of the State of Iowa in the above-entitled case on September 5, 1968.

OPINION BELOW

The opinion of the Supreme Court of Iowa, printed as Appendix B, *infra,* is reported at 160 N.W. 2d 838.

JURISDICTION

The decision of the Supreme Court of Iowa was rendered on September 5, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Petitioner Crane's complaint cited and relied upon the federal Safety Appliance Act (R. 5-12). He raised the issue of the consequences of violating the Act, including the availability of contributory negligence as a defense, by pre-trial conference memorandum (R. 38-39), by requested instructions (R. 255-258), and by objections (R. 258-262) to the trial court's instructions (R. 262-268).[1] The Iowa Supreme Court specifically passed upon these issues, App. B., *infra*, so that the federal questions involved are now ripe for review.[2]

STATUTES INVOLVED

This case involves §§ 2 and 7 of the Safety Appliance Act, 27 Stat. 531, 532 (1893), 45 U.S.C. §§ 2 and 7 (1954), and §§ 1, 3 and 4 of the Federal Employers' Liability Act, 35 Stat. 65, 66 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. §§ 51, 53 and 54 (1954). All are set out in Appendix A, *infra*.

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[1] Citations are to the "Abstract of Record" used in petitioner's appeal to the Supreme Court of Iowa and filed with the Clerk of this Court.

[2] Questions arising in state court actions "relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this Court." *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 214 (1934); *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor*, 210 U.S. 281, 293 (1908). In particular, whether a plaintiff's contributory negligence constitutes a defense to Safety Act violations is such a federal question. *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 220 U.S. 590, 597 (1911); *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 11 (1907).

QUESTION PRESENTED

Is the defense of contributory negligence available against a non-employee held to be within the class whom Congress intended to protect under the federal Safety Appliance Act, where this Court has ruled that a railroad's violation of the Act imposes absolute liability, and where the same person, if an employee, could recover under the same facts regardless of his own negligence?

STATEMENT OF THE CASE

At the time of his injury in Cedar Rapids, Iowa, on March 21, 1963, petitioner Ronald L. Crane was employed in his customary duties of moving, weighing and loading railroad cars delivered by the respondent railroad to a spur track servicing the meal house and elevator of Crane's employer, Cargill, Inc. After loading, the cars would be picked up by respondent for shipment to their ultimate destination (R. 45, 49, 154-159). At about 1 a.m. that morning, a co-employee (Harris), uncoupled two of a string of six such cars, and, using a winch and cables, moved them to a scale for weighing (R. 51-52, 134-35). After weighing, the two cars were winched back into the stationary and braked cars with sufficient force to recouple, had the couplers complied with the federal Safety Appliance Act (R. 52-54, 63, 92-98, 136). The couplers between the connecting cars appeared to lock but in fact did not (R. 53-54, 78, 88, 146). At about 4 a.m. that morning, Harris attached cables to the second car in the string, while Crane boarded the third car to release its brakes so that the string could be moved (R. 51, 136). But when Harris began to use the winch to move the string, the two cars at the head of the string broke away and headed down an incline toward the elevator

(R. 54-55, 136). On the elevator scale stood a box car in which, from past experience, Crane believed other men were working (R. 50-51, 54-55).

Petitioner Crane therefore immediately braked the car upon which he was stationed, dismounted, and ran after the moving cars to prevent a collision with the box car near the elevator (R. 50-51, 55). Crane caught up with the runaway cars, climbed onto the brake platform of one and, while operating the brake to stop the cars, fell twelve to fourteen feet from the brake platform, landing on a cement apron between the tracks (R. 55-56, 138). Respondent was the exclusive delivering and pick-up carrier (R. 158). The trial court instructed the jury that the railway cars on which Crane was working were being used by respondent as part of its system (R. 263). In an attempt to avert injury to others and damage to respondent's cars, Crane was thus injured in the furtherance of respondent's interstate commerce.

Crane, twenty-two years old at the time of the accident and the father of three children (R. 44), sustained fractures of both feet, serious injuries to the surrounding ligaments and soft tissue, and arthritis caused by the trauma (R. 131). According to uncontradicted medical testimony, he suffers from permanent impairment of thirty percent of the left lower extremity and twenty-five percent of the right lower extremity, permanent limitation of motion, and permanent pain (R. 132-33, 59). He is unable to run except with an excessive limp, has difficulty in making rapid motions, and suffers from pain and disability when doing prolonged and repetitive work (R. 133, 59). The injuries he sustained have eliminated some sources of potential

employment, particularly jobs requiring walking on rough ground or mounting ladders (R. 133). Thus Crane has been unable to return to his work at Cargill (R. 58) or to his previous job as an aluminum siding applicator (R. 45), which requires the use of ladders and scaffolding (R. 58). In addition, he has experienced difficulty in standing for long periods and working on ladders as part of his present job as an arc welder (R. 58). He underwent two operations and was unable to regain full-time employment until July of 1964, almost a year and a half after his accident (R. 57-58, 132).

Crane filed suit in the District Court of Linn County, Iowa, relying upon the federal Safety Appliance Act. The trial court held that liability under the Act was "not absolute" (R. 42-43) and, over his objection, instructed the jury that Crane must establish by a preponderance of the evidence that he was free from "negligence * * * which contributed in any way or in any degree directly to the injury" (R. 264-67). The jury thereupon found for the railroad.

Crane appealed to the Supreme Court of Iowa, claiming that contributory negligence is not a defense in a suit under the Safety Appliance Act. The Iowa Supreme Court conceded that Crane was covered by the Act; that if he had been a railroad employee in the same circumstances, contributory negligence could not have been used by the railroad as a defense; and that recent language in this Court's opinions "tends to support" Crane's position. Nevertheless, the Iowa court, with two justices dissenting, held that it was proper for the trial court to have submitted the issue of contributory negligence to the jury (App. B), and it therefore affirmed the judgment against him.

REASONS TO GRANT WRIT

This case raises the important question whether a railroad's violation of the federal Safety Appliance Act has the same legal consequences for a non-employee working on defective railroad equipment as for an employee, where both are persons whom Congress intended to protect under the Act. The Supreme Court of Iowa, while affirming the judgment for the respondent railroad, acknowledged that recent decisions of this Court "contain language which tends to support plaintiff's position * * *"[3]—that violation of the Act imposes absolute liability on the railroad for which the contributory negligence of employee or non-employee plaintiffs is no defense.

The Court below, however, declined to decide "whether these cases are harbingers of a change in position by the U.S. Supreme Court or merely imprecise language which frequently appears in dictum * * *".[4] Therefore, the Iowa court followed statements in earlier decisions by this Court which, at least without reference to their context, seemed to support the railroad's position. The Iowa court said it felt powerless "to place [a different] interpretation on the federal statutes * * *."[5] These comments underscore the need for this Court to make clear the significance of its recent rulings on the Safety Appliance Act, which correctly express Congress' intent to impose absolute liability regardless of who brings the suit, so long as he is covered by the Act.

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[3] *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, 160 N.W. 2d 838, 842-43 (Iowa 1968) (App. B).

[4] *Id.* at 843.

[5] *Ibid.*

1. Section 2 of the Safety Appliance Act requires that railroad cars covered by the Act use couplers which couple automatically upon impact and stay coupled until released by some purposeful act.[6] Petitioner Crane suffered serious and permanent injuries (R. 130-133) when he fell from a runaway railroad box car which he was attempting to brake before it struck another car in which he believed men were working (R. 55). The allegedly defective car, temporarily delivered by the respondent railroad for loading by Cargill, Inc., Crane's employer, was, at the time of Crane's accident, being used by the respondent as part of its system or line (R. 263), and the trial court expressly found that as "an employee of a consignee properly engaged in unloading cars on a siding under the control of the railroad," Crane stood within the class of persons protected by the Safety Appliance Act (R. 43).[7] The case went to the jury on one count alleging violation of the automatic coupler provision of that Act (R. 5-12).

This Court has ruled that its decisions "early swept all issues of negligence out of cases under the Safety Appliance Act. * * * [A] failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof

[6] *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, 338 U.S. 384, 389 (1949).

[7] On appeal, the Iowa Supreme Court stated: "This holding is supported by the authorities and is not challenged here." *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, *supra*, 160 N.W. 2d at 841 (citations omitted).

of care or diligence." *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra,* 338 U.S. at 390. Unlike actions brought solely under the Federal Employers' Liability Act (FELA), which applies only where the plaintiff establishes negligence on the part of a defendant railroad,[8] statutory liability in actions alleging Safety Act violations "is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous." *Brady* v. *Terminal R.R. Ass'n,* 303 U.S. 10, 15 (1938).

Corresponding to the absolute duty to comply with the Safety Act, violation of the statute's plain prohibition gives rise to "the liability to make compensation to one who is injured by it." *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra,* 210 U.S. at 295; *Fairport, Painesville & Eastern R.R. Co.* v. *Meredith,* 292 U.S. 589, 596 (1934). Where a non-employee plaintiff falls within the class protected by the Safety Act, "the violation of the statute must therefore result in absolute liability." *Shields* v. *Atlantic Coast Line R.R. Co.,* 350 U.S. 318, 325 (1956). Congress, appalled by the injuries and consequent financial burdens imposed on men working on and about railroads, adopted the Safety Act to change the master-servant duty at common law "and its resulting liability * * *."[9]

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[8] See, *e.g., Urie* v. *Thompson,* 337 U.S. 163, 188-89 (1949).

[9] *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra,* 210 U.S. at 294. See S. Rep. No. 1049, 52nd Cong., 1st Sess. (1892); H. R. Rep. No. 1678, 52d Cong., 1st Sess. (1892). See also *United States* v. *Seaboard Air Line R.R. Co.,* 361 U.S. 78, 82-83 (1959) (the Safety Act "should be liberally construed as a safety measure").

The trial judge, however, failed to follow this Court's mandate to sweep negligence issues out of actions based on the Safety Act, instructing instead that breach of the Safety Act's admittedly absolute duty amounts only to "negligence", defined as "want of ordinary care";[10] that "negligence on the part of a person injured * * * which contributed in any way or in any degree directly to the injury" bars recovery; and that Crane must establish the railroad's "negligence" and his own freedom from "contributory negligence" (R. 262-68). This Court, on the contrary, has expressly stated that violation of the Act's absolute duty is unrelated to negligence, and in particular that a plaintiff is "entitled to a peremptory instruction that to equip a car" with a defective coupler "was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered * * *." *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra,* 338 U.S. at 394; *Affolder* v. *New York, Chicago & St. Louis R.R. Co.,* 339 U.S. 96, 99 (1950). Instructions to that effect were requested below by Crane and were refused (R. 255-58).[11]

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[10] At least when read apart from the whole charge, this definition might well mislead the jury into concluding that exercise of ordinary care by the railroad excused violation of the Safety Act. The law is otherwise. *E.g., O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra,* 338 U.S. at 390.

[11] In contrast to the instructions given here, this Court has approved an instruction that negligence is not in issue in an action based on violation of the analogous Boiler Inspection Act, 36 Stat. 913 (1911), as amended, 45 U.S.C. §§ 22-34 (1954), and that the plaintiff should recover for breach of the defendant's "absolute and continuing duty" to comply with the statute. *Urie* v. *Thompson, supra,* 337 U.S. at 168.

Breach of the Safety Appliance Act and the analogous Boiler Inspection Act[12] imposes stricter liability on defendant railroads than does the "conventional tort doctrine" of absolute liability. *Urie* v. *Thompson, supra,* 337 U.S. at 195 n. 34. As Dean Prosser has pointed out, the Federal Safety Appliance Act imposes a liability beyond that even of most safety legislation, "for whose violation there is no recognized excuse." Prosser, *Law of Torts* 198-99 (3d Ed. 1964). Other disinterested commentators have pointed to the significance of the more recent decisions by this Court interpreting the Safety Act:

> But for the Court in [*O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra*] the concept of negligence is wholly irrelevant to a Safety Appliance Act cause of action. The liability for violation of the Act is absolute. No showing of care can exculpate. This reasoning quite clearly assimilates the Safety Appliance Act to that class of statutes which are construed to place the entire responsibility upon the violators of the statutes, and hence to abolish contributory negligence as a defense. * * * [S]tatutes of this class * * * are the product of deliberate social policy which, for one reason or another, puts the entire burden of protecting against the specified risk on the shoulders of only one party to the transaction. Thus, to state that a statute of this type *abolishes the defense of contributory negligence,* is but to state the obverse of the proposition that it places absolute liability—the entire burden—upon the violator.
>
> From the political and sociological viewpoint, it is hardly surprising that an era which provided widespread workmen's compensation coverage for

[12] 36 Stat. 913 (1911), as amended, 45 U.S.C. §§ 22-34 (1954).

most industrial employees, with its *total abolition of negligence and contributory negligence* and its acceptance of the philosophy that "the cost of the product shall bear the blood of the workmen," would also provide for workers on railroad equipment, injured by specifically prohibited defects in appliances, protection against their own contributory negligence.

* * *

Thus * * * [*O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co., supra; Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949); *Affolder* v. *New York, Chicago & St. Louis R.R. Co., supra*], the most recent Supreme Court cases which analyze the nature of a Safety Appliance Act cause of action, are at least implicit authority for the proposition that *the contributory negligence of the injured person is no defense to an action under this Act.* Since the Act constitutes permissible congressional regulation of interstate commerce, the absolute standards which it prescribes, and the consequences of those standards including *the inadmissibility of contributory negligence as a defense to violation of the standards, are applicable whenever the Act itself is applicable.* Thus, there is imposed by the Act, as the obverse of the coin of absolute federal standards, *the obliteration of contributory negligence as a defense to violation of the Act.* * * * [13]

If Crane had been an employee of the railroad, contributory negligence would not have barred his recovery for breach of the Safety Act had he pursued his rights under FELA (45 U.S.C. § 53 (1954)). Here Crane's work furthered respondent's interstate commerce. He

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[13] Louisell & Anderson, "The Safety Appliance Act and the FELA: A Plea for Clarification," 18 Law & Contemp. Prob. 281, 290-91 (1953) (footnotes omitted; emphasis added). The authors are Professors of Law at the University of Minnesota.

was engaged in weighing, moving and loading cars in use and supplied by the railroad on tracks which were part of the railroad's line, and was employed by the consignee of goods shipped over the railroad's line. Yet the state court denied him the protection which Congress explicitly grants to employee plaintiffs. This was error. FELA, rather than indicating an intent to so discriminate against non-employees, makes clear on its face that Congress intended instead to distinguish sharply between violations of the Safety Act and violations of ordinary negligence standards.

This distinction is pointed up by the fact that in common law negligence actions, Congress still allows contributory negligence to play a part, even when the suit is brought by a railroad employee. The contributory negligence of the employee in such actions proportionately reduces his recovery. 45 U.S.C. § 53 (1954). But when the action is based instead on a violation of federal safety standards, contributory negligence disappears as a defense. Thus, Congressional policy, as expressed in FELA and the Safety Act, supports extending special protection to all workers on railroad equipment, just as this Court's recent opinions have indicated. Imposing strict liability for failure to comply with the Safety Act's "absolute duty" complements penalizing the railroad for such violations regardless of fault. 45 U.S.C. § 6 (1967 Supp.).

Looking also to Congressional intent, this Court has struck the fellow-servant defense from actions charging Safety Act violations, even though the Act expressly abolishes only assumption of risk as a defense. In *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor, supra,* the administratrix of a railroad em-

ployee brought an action in a state court based solely on the railroad's failure to equip cars with draw bars as required under the Safety Appliance Act of 1893. The accident occurred prior to passage of FELA in 1908, which erased the fellow-servant doctrine in employee-railroad suits, and this Court did not mention that statute in its decision. Affirming the trial court's refusal to instruct that defendant escaped liability if the negligence of a fellow servant caused plaintiff's injury, this Court reasoned:

> * * * In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. * * * It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. *The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.* If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. * * * It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. * * * But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public.

> Where an injury happens through the absence of a safe draw bar there must be hardship. Such an injury must be an irreparable misfortune to some one. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. [210 U.S. at 294-96; emphasis added.]

Following the same reasoning, Congress could hardly have intended that the common law excuse of contributory negligence could be used to thwart the purpose of the Safety Act to impose the strictest liability for injuries caused by railroad equipment failing to meet the statutory requirements.

In suits based on accidents occurring after FELA's effective date, that statute provides a direct source of Congressional policy for determining questions not expressly answered in FELA or the Safety Act. In *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10 (1938), the employee of a connecting carrier, but not of the defendant railroad, brought a state court action for injuries caused by the defendant's failure to equip its car with secure grab irons as required by the Safety Act. This Court ruled that although not an employee of the defendant, plaintiff nevertheless was covered by

the Safety Act. Furthermore, even though the plaintiff was not "engaged in an operation in which the safety appliances are specifically designed to furnish him protection," the Court noted that its earlier decisions had "liberally construed" the statute so "that one can recover 'if the failure to comply with the requirements of the act is a proximate cause of the accident * * *'" (303 U.S. at 15), and held for the plaintiff in light of the "comprehensive rule" laid down by Congress "as a matter of public policy." Finally, this Court ruled that assumption of risk provided no defense to the railroad's liability, citing *both* the Safety Act and FELA (303 U.S. at 16). The sections cited by the Court applied on their face only to employees of the defendant railroad; yet this Court adopted the statutory rule for employees relating to assumption of risk and extended it to a *non-employee* working on a railroad car not in compliance with the Safety Act.[14] In light of the special liability imposed

[14] The Seventh Circuit has taken this approach to permit wrongful death actions based only on the Safety Appliance Act, by extending FELA provisions permitting such suits beyond the statute's literal boundaries to Safety Act suits. In *Ross v. Schooley*, 257 Fed. 290 (7th Cir.), *cert. denied*, 249 U.S. 615 (1919), the administratrix brought suit alleging that decedent, an employee of the defendant railroad, died of injuries caused by defective couplers. FELA did not apply because the plaintiff failed to allege and prove the connection to interstate commerce necessary to trigger that statute. Pointing out that implied liability for damages under the Safety Act spurs observance of its coupler provisions and thereby promotes the safety of those protected by the Act, the Seventh Circuit held: "Under the Employers' Liability Act there is no need to count upon any state statute creating a liability for wrongful death, because that liability was expressly stated by the Congress. *Inasmuch as the same legislative intent respecting liability is found in the Safety Appliance Act, the same result follows*" (257 Fed. at 291) (emphasis added). See also *Pennsylvania R.R. v. Logansport Loan & Tr. Co.*, 29 F.2d 1, 3 (7th Cir. 1928).

by FELA for violations of the Safety Act only, this Court may properly find in FELA the rule governing contributory negligence as a defense in Safety Act suits.

Nothing in the history of either Act militates against this view. On the contrary, while most of the discussion in Congress obviously was about employees, since they were the group most likely to suffer injury, there is not a word in the legislative history of either the Safety Appliance Act or FELA to suggest that Congress intended to distinguish between employees and non-employees insofar as contributory negligence is concerned. Instead, Congress' overriding interest was in imposing absolute liability in cases brought by those covered by the Act. Even respondent concedes that Crane was covered by the Act.

The courts of Illinois have adopted petitioner's position here, contrary to the ruling and reasoning of the Iowa Supreme Court below. In *Boyer* v. *Atchison, Topeka & Sante Fe Ry. Co.*, 34 Ill. App. 2d 330, 181 N.E. 2d 372 (App. Ct. 1962), plaintiff, an employee of another railroad, sued the defendant for injuries suffered while traveling on an interstate pass, alleging violation of the Safety Act's coupler provision. The pass, which the plaintiff signed, placed "all risk of damage" on him. Since the court found that federal law under the Safety Act and the Hepburn Act (49 U.S.C, § 1(7) (1959)) permits a carrier to exempt itself only from negligence liability, the case turned on the nature and consequences of liability for violating the Safety Act.

Rejecting the defendant's argument that breach of the Safety Act amounts only to "negligence per se,"

the Illinois court instead relied on the *O'Donnell*, *Carter*, and *Affolder* cases, *supra*, stating:

> * * * In every decision of the United States Supreme Court since the O'Donnell case in 1949, where the question has come before it, the court has consistently held that the violation of the Safety Appliance Act alone and a resultant injury creates a legal cause of action in no wise dependent upon any negligence theory. We find that the plaintiff does not charge the defendant with common law negligence, but charges it with absolute liability for violation of the Safety Appliance Act. [181 N.E. 2d at 375.]

At a new trial, the lower state court granted a summary judgment for the plaintiff on the issue of liability. Affirming, the Illinois Supreme Court agreed with the earlier appellate decision that Congress "imposed absolute liability" for breach of the Safety Act, and held:

> Under these circumstances and in view of the absolute standard imposed by the Act, we deem that to enforce the exculpatory provisions of the pass would subvert the purpose of the Act and defeat the public interest. [38 Ill. 2d 31, 230 N.E. 2d 173, 178 (1967), *cert. denied*, 390 U.S. 949 (1968).]

And so here, just as Congressional policy bars an exculpatory agreement as a defense to Safety Act violations, contributory negligence similarly cannot be used as an excuse for avoiding liability caused by such violations.

2. The Iowa Supreme Court cited several early decisions of this Court which suggest, at least in dictum, that the Safety Appliance Act does not abolish the de-

fense of contributory negligence in non-employee actions.[15]. But wholly apart from this Court's more recent rulings, careful analysis of the earliest case cited, *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 220 U.S. 590 (1911), on which later cases rely as authority, shows that the contributory negligence instruction given by the trial court below cannot stand even under that decision. The trial court instructed the jury, over Crane's objections, that in order to recover Crane must establish by a preponderance of the evidence his freedom from "negligence * * * which contributed *in any way or in any degree* directly to the injury" (R. 264-267) (emphasis added).

In *Schlemmer*, this Court affirmed a directed verdict for the defendant railroad "in view of the circumstances shown * * *" (220 U.S. at 597) and the testimony at trial. That testimony revealed that the plaintiff "met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did" (220 U.S. at

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[15] *Fairport, Painesville & Eastern R.R. Co.* v. *Meredith*, 292 U.S. 589 (1934); *Moore* v. *Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934); *Tipton* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141 (1936). In the first two of these cases, this Court ruled favorably to the plaintiffs; in the third, the Court found state workmen's compensation to be an adequate remedy for Safety Act violations. In none of these three cases, therefore, was this Court's comment on contributory negligence controlling. The Iowa Supreme Court also cited *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), in which this Court did not mention contributory negligence.

598-599). Thus this Court refused to extend the protection of the Safety Act to a plaintiff who ignored repeated warnings from his superior and co-employees not to attempt the dangerous act.[16]

But at the same time, this Court took care to point out that it found "no occasion to depart" from its decision on an earlier appeal in the same case, since the second decision rested on a record differing "in material respects" from that previously before the Court (220 U.S. at 593). In the earlier decision, *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 13 (1907), this Court reversed a verdict for a defendant railroad where the state court's ruling on contributory negligence was so "dependent upon an erroneous construction of the statute that if the judgment stood the statute would suffer a wound." This Court ruled that the plaintiff could not be barred from recovery merely because "he miscalculates the height of the car behind him by an inch * * *," since such negligence would be too closely tied to the risks of railroading, the burden of which Congress has explicitly shifted to the railroads (205 U.S. at 14).

Thus, rather than granting blanket permission for state courts to give broad contributory negligence instructions, particularly if the plaintiff has the burden on that issue, this Court qualitatively analyzed the evidence and affirmed the verdict for the defendant in the second *Schlemmer* decision only in the light of the plaintiff's willful insistence on performing an unneces-

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[16] Similarly, this Court has suggested that a railroad might escape liability where an adequate coupler failed because of "the work of a saboteur". *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, *supra*, 338 U.S. at 394 n. 7.

sary and dangerous act contrary to warnings. The court's instructions in this case, on the other hand, imposed an absolute standard of care on Crane.

Furthermore, the second *Schlemmer* decision noted "the absence of legislation, at the time of the injury complained of, taking away the defense of contributory negligence * * *" (220 U.S. at 597). As we point out above, FELA, which became effective after the date of the injury in *Schlemmer*, now provides a source for the rule that the Safety Act bars contributory negligence from excusing the railroad for its violation of the Safety Act.[17]

3. Having failed to recognize the intent of Congress to impose strict liability for breach of the Safety Act, and having misinterpreted this Court's decisions construing that Act, the Iowa court turned to state law to find the rule permitting or forbidding contributory negligence as a defense in this action. But both the Safety Act itself and the underlying policy of Congress are paramount in this field and "should be respected accordingly in the courts of [the] State." *Second Employers' Liability Cases*, 223 U.S. 1, 57 (1912). Where the plaintiff's rights arise from violations of a federal standard, federal law (as incorporated into state law) governs what defenses are available under that statute, *Dice* v. *Akron, Canton & Youngstown R.R.*

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[17] Even in employee actions under FELA based solely on negligence and not on Safety Act violations, this Court has ruled as a matter of federal law that the *defendant* has the burden of showing the plaintiff's contributory negligence. *Central Vt. Ry. Co.* v. *White*, 238 U.S. 507, 512 (1915). The trial court below not only erroneously permitted contributory negligence as a defense to a Safety Act suit but also put the burden on the *plaintiff* to establish his freedom from any negligence (R. 264-267).

Co., 342 U.S. 359, 361 (1952), since "the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct * * *."[18]

As commentators on the Safety Appliance Act have pointed out:

> * * * [T]he Act does something more than impose federal standards on the railroad; it imposes on the state court the federal obligation of selecting, from among the various doctrines available to that court under state law as to the civil consequences of violation of statutory standards, the doctrine consistent with an absolute standard. And there seems to be but one doctrine known to the common law which fits such a standard—the doctrine which, by putting all the risk on the standard's violator, implicitly obliterates the defense of contributory negligence. [Louisell & Anderson, *supra* n. 13 at 291-292.]

Uniform interpretation under federal law of the Safety Act's consequences guarantees even-handed treatment

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[18] *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U.S. 33, 41-42 (1916). See also *Boyer* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 38 Ill. 2d 31, 230 N.E. 2d 173, 176 (1967), *cert. denied*, 390 U.S. 949 (1968) (federal law determines the availability of defenses to a non-employee Safety Act suit in a state court).

Similarly, this Court stated in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942), "When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." See also *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964); *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 458 (1957) (federal law resolves problems which "lie in the penumbra of express [federal] statutory mandates" by "looking at the policy of the legislation * * *").

of all persons using railroad equipment covered by the Act, essential to effectuate the statute's "wise and humane" purpose of imposing extraordinary safety obligations and the corresponding strictest liability upon railroads.[19]

4. The importance of the decision below ranges far beyond the immediate case. The decision not only frustrates Congressional policy but will result, if allowed to stand, in an extraordinary anomaly in the Safety Appliance Act cases brought in the various state courts across the country. A man performing railroad business on the railroad's system who is injured as a result of the railroad's failure to meet the Act's safety requirements will recover for his injuries, even though contributorily negligent, if he happens to be employed by the railroad. Another man, performing the same railroad business on the railroad's system and also injured as a result of precisely the same failure of the railroad to meet the safety requirements of the same Act, will be prohibited from recovering because of the same contributory negligence that was deemed irrelevant in the other case, if he happens to be employed by some one other than the railroad. Could Congress conceivably have intended any such absurd result? We submit that it could not. Once it is determined, as all concede here, that the injured party is covered by the Act, Congress surely intended that absolute liability be imposed, without regard to the various defenses applicable to common law negligence cases.

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[19] *Louisville & Nashville R.R. Co.* v. *Layton*, 243 U.S. 617, 621 (1917).

CONCLUSION

As this Court has stated, "It is hard to think of a coupler defect in which greater danger inheres to workmen, travelers and all to whom the railroad owes a duty, than one which sets cars running uncontrolled upon its tracks."[20] In this case, petitioner Crane suffered serious and permanent injuries in attempting to stop a runaway car from colliding into another car in which he believed men were working. Had the runaway car struck the second car, respondent's violation of the Safety Appliance Act would have rendered it liable for the resulting injuries. Though Crane was properly engaged in railroad work and his attempt to stop the runaway car was for respondent's own benefit, the Supreme Court of Iowa (two Justices dissenting) refused to extend to him the protection afforded by the Act—although it conceded that he was covered by the Act. The Iowa court denied Crane any recovery whatever even while admitting that language in recent decisions of this Court, ruling that violation of the Act's absolute duty results in absolute liability to employee and non-employee alike,[21] "tends to support" Crane's position that contributory negligence can play no part in Safety Act cases.

This is hardly an inconsequential problem, or one of decreasing importance. Almost 2,000 train accidents occurred last year in the United States as a result of defective equipment—or more than a quarter of all train accidents in the country. Close to 400 of

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[20] *O'Donnell* v. *Elgin, Joliet & Eastern Ry. Co.*, *supra*, 338 U.S. at 388.

[21] *E.g.*, *Shields* v. *Atlantic Coast Line R.R. Co.*, *supra*.

these were attributable to coupler defects. In addition, couplings were in some way involved in "train service" accidents (those causing smaller damages to cars than "train" accidents) which killed or injured almost a thousand persons. In fact, train and train service accidents to persons other than employees, passengers and trespassers accounted for 1,632 persons killed and 4,048 injured in 1967 alone. Over the past seven years, the *monthly* average of railroad accidents has increased steadily from 341 in 1961 to 590 in 1967. The problem has now reached the point where the United States, during the most recent six-month period, brought suit to recover statutory penalties for 347 Safety Act violations.[22]

In the light of the importance of this issue in the numerous cases brought each year in state courts charging violations of the federal Safety Appliance

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[22] The above statistics are derived from U.S. Dep't of Transportation (Federal R.R. Administration), Accident Bull. No. 136, Tables 5, 16, 24 (1968); Statement by Alan S. Boyd, Secretary of Transportation, accompanying proposed Federal Railroad Safety Act of 1968, April 29, 1968; U.S. Dep't of Transportation (Federal R.R. Administration), Press Releases, Sept. 30, 1968, Sept. 16, 1968.

Act, and for the reasons stated above, the Petition for a Writ of Certiorari should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX A

1. The Federal Safety Appliance Act, 27 Stat. 531 (1893), as amended, 45 U.S.C. § 1, et seq., provides in pertinent part:

§ 2. *Automatic couplers*

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars [27 Stat. 531 (1893), 45 U.S.C. § 2 (1954)]

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§ 7. *Assumption of risk by employees*

Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the provision of sections 1-7 of this title shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge. [27 Stat. 532 (1893), 45 U.S.C. § 7 (1954)]

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2. The Federal Employers' Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. § 51, et seq., provides in pertinent part:

§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Terri-

tories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. [35 Stat. 65 (1908) as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1954)]

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§ 53. *Contributory negligence; diminution of damages*

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. [35 Stat. 66 (1908), 45 U.S.C. § 53 (1954)]

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§ 54. *Assumption of risks of employment.*

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. [35 Stat. 66 (1908), as amended 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1954)]

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APPENDIX B

(Opinion and Judgment of the Supreme Court of Iowa.)

SUPREME COURT OF IOWA

No. 52991

RONALD L. CRANE, *Appellant*,

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY COMPANY, a Corporation, *Appellee*.

Sept. 5, 1968

Action for injuries sustained when plaintiff fell from railroad boxcar. The Linn District Court, Thomas H. Nelson, J., entered judgment on jury verdict for defendant and plaintiff appealed. The Supreme Court, Stuart, J., held that, even if defendant railroad had violated federal Safety Appliances Act, submission of question of contributory negligence of plaintiff to jury was not improper.

Affirmed.

RAWLINGS and BECKER, JJ., dissented.

Arthur O. Leff, Iowa City, and Halloran & Alfveby, Minneapolis, Minn., for appellant.

John F. Gaston, Jr., Ted P. Lewis, and Lynch, Dallas, Smith & Harman, Cedar Rapids, for appellee.

STUART, Justice.

Plaintiff brought this action in the Linn County District Court to recover damages for personal injuries received when he fell from a runaway railroad box car which he was attempting to stop by applying the brakes. The railroad car had been delivered to Cargill, Inc. by defend-

ant. Plaintiff, an employee of Cargill was engaged in spotting cars for his employer at the time of the accident. He sought to impose liability on defendant by alleging it failed to have the cars equipped with couplers coupling automatically by impact as required by 45 U.S.C.A., § 2. The case was submitted to the jury which returned a verdict for defendant. Plaintiff has appealed.

I. Plaintiff's first three errors relate to instructions given or requested instructions refused and depend upon his claim failure of the railroad equipment to perform as required by the Safety Appliance Acts (S.A.A.) 45 U.S.C.A. §§ 1-7, is in itself an actionable wrong which results in absolute liability and contributory negligence is no defense. It is our opinion the defense of contributory negligence was available to defendant and the instructions in this regard were correct.

It is well settled the duty imposed on the railroads by the Safety Appliance Acts is "an absolute one and the carrier is not excused by any showing of care, however assiduous". Brady v. Terminal R.R. Assn., 303 U.S. 10, 15, 58 S.Ct. 426, 429, 82 L.Ed. 614, (1937) and citations.

It is also well settled " 'the nature of the duty imposed by a statute and the benefits resulting from its performance' usually determine what persons are entitled to invoke its protection". Brady v. Terminal R.R. Assn., supra, loc. cit. 14, 58 S.Ct. loc. cit. 429. The trial court ruled plaintiff was within the class of persons intended to be protected by the S.A.A. This holding is supported by the authorities and is not challenged here. Boyer v. Atchison, Topeka and Santa Fe Railway Co., 38 Ill.2d 31, 230 N.E.2d 173; Jacobson v. New York, N. H. & H. R. Co., 1 Cir., 206 F.2d 153; Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 76 S.Ct. 386, 100 L.Ed. 364; Brady v. Terminal R.R. Assn., supra; Fairport R. Co. v. Meredith, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446.

Employees of carriers are given the further protection of the Federal Employers' Liability Act, (F.E.L.A.). 45 U.S.C.A. Chapter 2. Employees may bring action for personal injury in either the federal or state courts. 45 U.S.C.A. § 56. In actions under F.E.L.A. based on violation of S.A.A. the carrier may not invoke assumption of risk or contributory negligence as a defense. 45 U.S.C.A. §§ 53-54.

Crane as a nonemployee is not entitled to the benefits of the F.E.L.A. and, as the S.A.A. does not provide a remedy, he brought his action in the state court subject to state law.

An examination of the cases convinces us the Safety Appliance Acts impose an absolute duty on the railroad carrier to equip its cars as required by statute and failure of the safety appliance to so operate is negligence per se. In the absence of statutory state law to the contrary, the injured party is required to exercise due care for his own safety and under Iowa law his contributory negligence is a proper defense to be submitted to the jury.

The U.S. Supreme Court first considered the question in Schlemmer v. Buffalo R. & P. Ry. Co., 220 U.S. 590, 31 S.Ct. 561, 55 L.Ed. 596 (1910). There the Pennsylvania trial court submitted the case to the jury under an allegation that defendant had violated 45 U.S.C.A. § 2 by failing to have automatic couplers. The question of contributory negligence was included. The court pointed out that Congress had expressly provided the employee should not be deemed to have assumed the risk "[b]ut there is nothing in the statute absolving the employee from the duty of using ordinary care to protect himself from injury in the use of the car with the appliances actually furnished". 220 U.S. at 596, 31 S.Ct. at 563.

"In the absence of legislation at the time of the injury complained of, taking away the defense of contributory

negligence, it continued to exist, * * *." 220 U.S. at 597, 31 S.Ct. at 563.

"In view of this record we cannot say that the court, in denying a recovery to the plaintiff, upon the ground of contributory negligence of the deceased, denied to her any rights secured by the Federal statute." 220 U.S. at 598, 31 S.Ct. at 564.

In Fairport P. & E. R. Co. v. Meredith, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446 (1933), the Supreme Court held the duty imposed by the Safety Appliance Acts "in respect of power controlled brakes extends to an includes travelers at railway-highway crossings." 292 U.S. at 597, 54 S.Ct. at 829.

"* * * [T]he trial court instructed the jury, in effect, that, if the violation of the federal act resulted proximately or immediately in the injury complained of, the railroad company was liable. But the jury was also told that, if respondent was guilty of contributory negligence, she could not recover notwithstanding the negligence of petitioner." 292 U.S. at 593, 54 S.Ct. at 827.

The court said: "The federal Safety Appliance Act, as we already have said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law. The act does not affect the defense of contributory negligence, and, since the case comes here from a state court, the validity of that defense must be determined in accordance with applicable state law." 292 U.S. at 598, 54 S.Ct. at 829.

In 1934 the U.S. Supreme Court reaffirmed its position with regard to the defense of contributory negligence in

Moore v. Chesapeake & Ohio Ry. Co., 291 U.S. 205, 216, 54 S.Ct. 402, 78 L.Ed. 755, and Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57, 61, 54 S.Ct. 573, 78 L.Ed. 1123.

In Tipton v. Atchison, Topeka and Santa Fe Ry. Co., 298 U.S. 141, 146, 56 S.Ct. 715, 80 L.Ed. 1091 (1935), the court held California was at liberty to afford any appropriate remedy for breach of the duty imposed by the S.A.A. and could limit plaintiff's recovery to workmen's compensation. The court said: "The Safety Appliance Acts impose an absolute duty upon an employer * * *. The absolute duty imposed necessarily supersedes the common-law duty of the employer. But, 'unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employee's common-law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act." 298 U.S. at 146, 56 S.Ct. at 716.

The U.S. Supreme Court has not overruled or modified these clear holdings. Plaintiff cites more recent cases which he claims show an inclination on the part of the court to treat absolute duty and absolute liability the same.

In Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 76 S.Ct. 386, 100 L.Ed. 364 (1955), a nonemployee sought damages for personal injuries sustained when a platform near the dome on a tank car broke causing him to fall. The main question was whether this platform was a safety appliance within the S.A.A. The only comment pertinent to our problem here is found in the last paragraph of the opinion. The court said: "There is no merit in respondent's contention that, since petitioner is not one of its

employees, no duty is owed him under § 2 of the Act. Having been upon the dome running board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. Coray v. Southern Pacific Co., 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208; Brady v. Terminal Railroad Assn., 303 U.S. 10, 58 S.Ct. 426, 82 L.Ed. 614; Fairport, P. & E. R. Co. v. Meredith, 292 U.S. 589, 54 S.Ct. 826, 78 L.Ed. 1446; Louisville & N. R. Co. v. Layton, 243 U.S. 617, 37 S.Ct. 456, 61 L.Ed. 931." 350 U.S. at 325, 76 S.Ct. [386] at 391.

The authorities cited do not support the comment on absolute liabilty. The issue of contributory negligence was not in the case and was not mentioned in the opinion.

Three F.E.L.A. cases, Carter v. Atlanta & St. Andrews Bay R. Co., 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); O'Donnell v. Elgin J. & E. R. Co., 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187 (1949); and Affolder v. N. Y. C. & St. L. R. Co., 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); contain language which tends to support plaintiff's position, but the issue of contributory negligence was not mentioned.

Whether these cases are harbingers of a change in position by the U. S. Supreme Court or merely imprecise language which frequently appears in dictum, we do not know. The federal statutes have not been changed. The reasons for holding a nonemployee's action is governed by applicable state law seem sound and still exist. In any event, we do not consider it our prerogative to place an interpretation on the federal statutes which differs from that of the U. S. Supreme Court. No one claims contributory negligence is not a defense under Iowa law.

Other federal courts have consistently held contributory negligence is available as a defense in S.A.A. cases if the state law so provides.

In Hartley v. Baltimore & O. R. Co., 3 Cir., 194 F.2d 560, 563 (1952), the court said: "The express exception and the only exception is where, as above stated, an employee is suing his employer under the Federal Employers' Liability Act and violation of a safety statute enacted for the benefit of employees contributed to the injury. * * *".

"In any event the case against Baltimore and Ohio was tried and decided as a diversity suit and not under the Federal Employers' Liability Act. The only negligence finally pressed against Baltimore and Ohio was its alleged violation of the Federal Safety Appliance Act which as we have seen does not exclude the defense of contributory negligence. The court expressly charged that Hartley was not an employee of the Baltimore and Ohio and that the Federal Employers' Liability Act had no application to his claim against that railroad. The applicable state law was that of Pennsylvania and under that law contributory negligence is a valid defense though there has been a violation of a statute enacted for the safety of employees." 194 F.2d at 563.

In Jacobson v. New York, N. H. & H. R. Co., 1 Cir., 206 F.2d 153, 157, the court said: "But it is abundantly clear that the federal courts have not, as a matter of federal common law, developed a private right of action for damages for personal injuries resulting from a breach of the Safety Appliance Acts, in favor of persons not entitled to sue under the provisions of the Employers' Liability Acts."

"It follows, therefore, that if an action is brought in a state court by a passenger or other person not entitled to sue under the Employers' Liability Acts to recover damages for personal injury resulting from a violation of the Safety Appliance Acts, issues bearing upon the right to recover, relating, for example, to common law doctrines of last clear chance, the defense of contributory negligence,

or proximate cause, depend upon the local law of the state where the injury occurred, and do not present federal questions reviewable by the Supreme Court under 28 U.S.C. § 1257(3)." 206 F.2d at 157.

"It follows also, that if such an action is brought in or removed to a federal district court on grounds of diversity of citizenship, the substantive law to be applied, in determining the right to recover, is the statutory or common law of the state." 206 F.2d at 157.

In Hunter v. Missouri-Kansas-Texas Railroad Company, 276 F.Supp. 936, 943, (1967), the U. S. District Court in Oklahoma said: "* * * where the plaintiff is not an employee of the Katy Railroad, that the Katy Railroad may assert the defense of contributory negligence with reference to its alleged violation of the Federal Safety Appliance Act and if the plaintiff is guilty of contributory negligence he may not recover against the Katy Railroad for either any common law negligence on its part or any violation by it of a provision of the Federal Safety Appliance Act."

"In view of this finding and the state of the law to the effect that this defense is available in this case to Katy Railroad under both counts against it, namely, a violation of the Federal Safety Appliance Act and common law negligence in delivering a defective car to the Halliburton Company siding for unloading by its employees, the Court finds and concludes that the plaintiff is, therefore, not entitled to recover herein against Katy Railroad by virtue of said contributory negligence on his part as found by the court under the evidence." 276 F.Supp. at 944.

Plaintiff has cited no cases from any courts which specifically considered the question of contributory negligence and held differently from the U. S. Supreme Court. Boyer v. Atchison, Topeka and Santa Fe Ry. Co., 38 Ill.2d 31, 230 N.E.2d 173, 176, (1967), is the most nearly in point.

There the Illinois court affirmed judgment on the pleadings on the question of liability in a suit by an nonemployee under the S.A.A. The court said: "Thus, it is apparent that a breach of the Safety Appliance Act does give rise to a civil cause of action which is separate from any cause of action based on negligence and that absolute liability for such breach is imposed on the violator."

Contributory negligence was not an issue. The question was whether the employee was in the protected class. The same year a federal court in Hunter v. Missouri-Kansas-Texas Railroad Company, supra, specifically confirmed the past precedents.

Louisell and Anderson in an article in 18 Law and Contemporary Problems 281-295 argues persuasively that a railroad employee and the employee of a shipper injured while setting a defective hand brake should not be treated differently. The obvious answer is that the federal statutes as interpreted by the U. S. Supreme Court make such distinction. "If, * * * conditions have come into existence which call for a change in the rule that is not a matter for this court but for the Congress." Hartley v. Baltimore & O. R. Co., 194 F.2d 560, 563.

We do not believe the U. S. Supreme Court has altered its interpretation of the Federal Safety Appliance Acts, 45 U.S.C.A. Chapter 1 and the Federal Employer's Liability Act, 45 U.S.C.A. Chapter 2. Until they do or until Congress amends the statutes, we will hold with existing precedents. The trial court correctly submitted the question of plaintiff's contributory negligence to the jury. There is no merit in plaintiff's first three assignments of error.

II. Plaintiff's next assignment of error is founded upon the trial court's exclusion of certain evidence. In order to understand the significance of the excluded testimony

it is necessary to briefly describe circumstances surrounding the accident.

Crane was employed by Cargill, Inc. as a meal house helper. He helped move railroad cars between the meal house where they were loaded and the elevator and scales to the north where they were weighed before and after loading. The track between the meal house and the scales was slightly lower than at either of these facilities. The cars were moved by cables attached to electric winches. Because of the saucer effect, gravity aided the movement. Three Cargill employees testified that prior to the date of the accident they had seen cars running free from the meal house to the elevator roll all the way to the elevator and partly on the scale.

On the day of the accident, Crane and a fellow employee moved the two north cars from a string of six cars located south of the meal house to the scales to be weighed before loading. The brake had been set on the third car and the pin lifted on the coupler to release the two cars from the chain.

After weighing they were winched back and supposedly coupled to the original group before the first car was loaded. After the first car was filled, Harris instructed Crane to get on top of the third car and work the brake in a manner to spot the second car in the chain for loading. Harris attached the winch to the second car. Although Crane and Harris said the second and third cars appeared to be coupled together, the first two cars "took off quite rapidly" from the standing string back toward the elevator and scales when Harris started the winch.

Crane reset the brake on the third car, climbed down the ladder, ran and caught up with the two runaway cars after they had traveled about a length and a half, climbed up on the south end of the second car, and started operating the brake. He fell off the brake platform landing on the

cement apron between the tracks approximately 10'-14' below smashing both heels.

Crane testified: "* * * the thought in my mind was to get these cars stopped before they had any chance to get down to the other cars sitting down on the scale where to the best of my knowledge there were people in this car, and I did my best to get these cars stopped before they could get down there, * * *."

He also testified: "At that time or prior to that I had observed a car in the elevator scale area. Cargill conducts unloading operations at the scale. Cars are brought in, loaded on the bean track, and brought into the meal house track at the elevator for unloading. When these two cars broke away I observed a car in the elevator area. Whenever there is a car on the scale it is presumed that somebody is inside working. I assumed there were people inside unloading this car.

'When the two cars broke away, I observed Harris start running toward the far end of the cars. At this time there was a grade in the track, which goes down from the meal house to the elevator. My immediate reaction was to get these cars stopped before they could get to the elevator because of people possibly down in this car working."

Later in plaintiff's testimony there is the following record.

"Q. Yes. Now I will ask you, Mr. Crane, that if prior to the occurrence of your accident on March 21st, 1963 you had ever seen cars being cut off or pulled from the meal house track where they did not stop in the saucer but proceeded down all the way to the elevator? Have you seen that? A. No, sir.

"Q. You have not seen that? A. No, sir.

"Q. Had you heard of them doing that? A. Yes, sir.

"Mr. Dallas: Objected to as calling for hearsay and immaterial. The Court: Sustained."

It is the exclusion of this evidence upon which plaintiff seeks reversal.

We believe it was error to exclude the proffered testimony as hearsay, but hold under the record that it was not prejudicial to this plaintiff because the answer was permitted to stand.

"Hearsay evidence has been defined as testimony in court or written evidence, of a statement made out of court; such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. McCormick, Evidence, page 460." Daniels v. Bloomquist, 258 Iowa 301, 312, 138 N.W.2d 868, 875.

The foregoing testimony was not offered to prove the truth of matters asserted. It was offered to show the reason Crane chased the cars in an effort to stop them.

"Wherever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, * * * and thus the hearsay rule interposes no obstacle to the use of * * * oral informations * * * or any other form of verbal utterances by one person, as circumstantial evidence that *another person had knowledge* or belief as to * * * the *dangerous condition* of a place or a machine." Wigmore on Evidence, 3rd Ed., Vol. VI, Sec. 1789, pp. 235-237. See also: 29 Am. Jur.2d 404-407, Evidence, § 355-357; 31A C.J.S. Evidence § 257, pp. 676-678.

However, the question was answered before the objection was sustained. Defendant did not state reasons for the

belated objection and did not move to strike the answer. As the answer was allowed to stand, the ruling did not have the effect of striking the testimony and it remained in the record for consideration and plaintiff was not prejudiced by the ruling. Oakes v. Peter Pan Bakers, Inc., 258 Iowa 447, 451, 138 N.W.2d 93, 96; Correll v. Goodfellow, 255 Iowa 1237, 1247, 125 N.W.2d 745, 751; Hamdorf v. Corrie, 251 Iowa 896, 903, 101 N.W.2d 836, 840; Ducummon v. Johnson, 242 Iowa 488, 496, 47 N.W.2d 231, 236; Livingstone v. Dole, 184 Iowa 1340, 1343, 167 N.W. 639, 641; Marple v. Ives, 111 Iowa 602, 603, 82 N.W. 1017.

III. Plaintiff claims the trial court abused its discretion in refusing to allow him to reopen his case to offer certain evidence after he had rested, but before any of defendant's evidence had been introduced. His position is that it explained the following testimony given on cross-examination.

"During the accident movement, when the two cars began to move way, I set the brake on the third car, climbed down the ladder, overtook the Southernmost of the two moving cars, got up on the brake platform, was engaged in turning the brake wheel on that car when for some unknown reason I lost my balance.

"Q. That's right. And you told us before for some unknown reason you lost your balance, isn't that true? A. Yes, sir, I don't know the reason why.

"Q. That's right. And you told us before there was nothing gave way on that car that caused you to fall? A. No, sir."

Plaintiff in his motion to reopen indicated he wanted to read the following excerpt from his own discovery deposition.

"Q. Do you know exactly what it was that caused you to fall? A. Yes, it was the hurry that caused me to fall.

"Q. There wasn't any defect give way on any car or anything like that, was there? A. Well, by anything being at fault, I will say it was because of the situation that I was in such a hurry to get the car stopped so nobody else would get hurt. I didn't think about myself."

The trial court refused to allow plaintiff to reopen his case to present this proffered evidence.

It is doubtful that this evidence was admissible in the form offered, but we need not resolve this question as the trial court was well within his discretion in refusing to permit plaintiff to reopen. We will not interfere with such ruling unless there was a clear abuse of diseretion. Spry v. Lamont, 257 Iowa 321, 336, 132 N.W.2d 446, 454; Robson v. Barnett, 241 Iowa 1066, 1071, 44 N.W.2d 382, 384; 53 Am.Jur. 109, Trial § 123.

IV. Plaintiff contends the trial court erred in sustaining objections to certain evidence offered in rebuttal. Defendant had introduced evidence that the maximum speed attained by cars being winched from the meal house dock to the elevator and scales was 1.79 miles per hour. Evidence was also introduced that it took longer to set the brakes on some cars than on others.

On rebuttal plaintiff testified these two cars "took off faster than a walk" and seemed to be moving away "pretty quickly" and that the speed of the cars depended upon a number of factors which he listed.

He also testified that it "varies on how fast you can get the cars stopped, the type of brake, not necessarily the type of brake, it's just some have got more slack in them than others". He was not permitted to answer the following questions:

(1) "What effect, if any, did the speed of these cars, as you observed it, have on your conduct?"

(2) "At the time you attempted to set the brake * * * on car No. 2, what effect if any did this fact [variance in time to set brakes] have upon your state of mind?"

He was not permitted to introduce the following excerpt from his own discovery deposition. "I said if I had been walking then the situation wouldn't have been there because I wouldn't have tried to stop those cars if there hadn't been a chance of somebody getting seriously injured."

The trial court has considerable discretion in determining what is rebuttal evidence. Robson v. Barnett, 241 Iowa 1066, 1071, 44 N.W.2d 382, 384, and citations. The trial court was justified in ruling this evidence was not rebuttal. It was an attempt to prove on rebuttal that plaintiff was hurrying to stop the cars before someone was hurt. It did not attempt to disprove any of the matters introduced by defendant.

We have already said the trial court did not abuse its discretion in failing to allow plaintiff to reopen to offer similar evidence as part of his main case.

For the reason stated herein, we find no reversible error and the trial court is affirmed.

Affirmed.

All Justices concur except RAWLINGS and BECKER, JJ., who dissent.